DOCUMENT RESUME

ED 304 607 CG 021 480

AUTHOR Ofsanko, Frank
TITLE Current Legal I-O Issues.
PUB DATE Aug 88
NOTE 12p.; Paper presented at the Annual Meeting of the American Psychological Association (96th, Atlanta, GA, August 12-16, 1988).
PUB TYPE Reports - General (140) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Compliance (Legal); *Court Litigation; Federal Legislation; *Industrial Psychology; *Legal Problems; Legal Responsibility; *Psychologists; State Legislation; Testing Problems; Work Environment

ABSTRACT

This report focuses on a myriad of national, state, and local laws, regulations and court decisions which govern the everyday work of industrial and organizational psychologists. Legislation already in effect and legislation still pending are discussed. Citing relevant legislation and court decisions throughout the text, the paper addresses such issues as equal opportunity employment, validity generalization and test transportability, testing policies for employment and education, confidentiality and demands for privacy, drug testing and proper drug testing procedures, polygraph testing, computerized personality test results and interpretation, individual and employee rights, participative decision-making, informing employees of safety or health hazards in the workplace, employee protection from such hazards, how employers should deal with employees having acquired immune deficiency syndrome and other contagious diseases, definitions of various handicaps and handicapped workers, job stress, worker's compensation, alcoholism and chemical dependency, compulsive gambling, workforce illiteracy, comparable worth and equal pay, aging workers, genetic screening, smoking, and sexual harassment. Workplace surveillance, via telephone and electronic equipment, is also discussed. (NB)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

Current Legal I-O Issues
Presented at the 96th Annual Convention of the American Psychological Association, Atlanta, August, 1988

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

Dr. Frank Ofsanko
Southern California Edison
Rosemead, CA

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Dr. Frank Ofsanko
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED304607

I'll be broadening the focus of this symposium from I-O concerns of licensure and state associations to other practitioner issues. Becoming legally authorized to practice is only the first step that we must take in order to practice in a legal manner. There are a myriad of national, state, and local laws, regulations and court decisions governing our everyday work.

We all realize that our society has become increasingly legalistic and litigious. For that reason alone, we must know the legislation and regulations relevant to our work. We also should try to understand the legal climate and framework within which we practice. That understanding sometimes calls attention to our professional responsibilities.

CS 021480

For those of you who found Ron Downing's slide on regulatory procedures overly complex, as I did, I'd like to refer you to Jim Ledvinka's regulatory model, as described in his book *Federal Regulation of Personnel and Human Resource Management.* According to the model, social problems trigger legislation, which is then enforced by governmental agencies, interpreted by the courts, and reacted to by employers.

Our social problems, mores, and laws are continuously evolving, interacting, and changing. A generation ago we saw equal opportunity employment legislation. Employees now expect fair and equal treatment in employment, pay, and benefits,

BEST COPY AVAILABLE

regardless of race, sex, religion, etc. Legislation and court decisions are still trying to define these expectations.

Most of you have probably already read the very recent *Watson v. Ft. Worth Bank* U.S. Supreme Court decision involving a black teller. Individual APA Divisions can no longer file amicus briefs, but APA itself filed a brief in the case, stating that subjective decisions could be validated. The Supreme Court concurred, and decided that disparate impact analysis was appropriate with subjective decisions.

Among other things, the Watson decision *may* say that formal validation studies often may not be necessary. The legal importance of a validation study *may* depend upon the kind and degree of business necessity shown by the employer. This view did not receive a majority opinion. But we may get some guidelines in a case that the U.S. Supreme Court decided to hear this Fall: *Atonio v. Ward's Cove Packing Company*. Perhaps I shouldn't have used the term "guidelines."

The equal employment opportunity movement has impacted other testing developments, such as validity generalization. According to Jim Sharf in a fairly recent *TIP* article, the legal box score is four lower court decisions favoring validity generalization and test transportability, one against. Most of us are awaiting a more definitive higher court decision.

You may have heard about a new group formed called the National Commission on Testing and Public Policy. With $800,000 funding from the Ford Foundation, it plans by the end of 1989, to develop policy recommendations regarding testing for employment and education. For example, it expects to address validity generalization

and alternatives to testing with lesser adverse impact. It will use numerous invited papers for its input, and will gear its recommendations for future legislation.

Another area of change is our increased demands for privacy. The Constitution provides no express right of privacy, but our culture nevertheless expects it. The national Privacy Act was passed in 1974. Numerous states have passed individual privacy-related laws. The legislation is continuing to attempt to protect privacy on a number of fronts.

One very active front is drug testing. Most times I go to read an article on testing these days, it turns out to be about drug testing. Issues include invasion of privacy, search and seizure, and confidentiality, reliability, and validity of test results, including false positives and false negatives.

Employers find themselves between a rock and a hard place trying to respect employee privacy, while at the *same* time trying to operate safely and efficiently, while substantial numbers of employees are using drugs. Reports two years ago in the *Wall Street Journal* and *Time Magazine* said that 25% of Fortune 500 companies were drug testing, with the number of companies increasing. According to the American Council on Drug Education, one-third of all private and governmental organizations are testing for drugs, including 90% of the utilities and 80% of transportation companies.

When drug testing is challenged in the courts, cases generally have been decided in favor of the employer. Drug test screening, apparently, is legal under proper circumstances. It depends how and why the testing is done, and in which state. Also, there are national bills being considered right now that would require employers to

maintain a drug-free workplace or lose their federal contracts. We're certain to see further legislation and court decisions specifying proper drug testing procedures.

We should be concerned with drug testing not only from job relatedness and testing perspectives, but from the perspective of applicant flow. Scattered reports that I hear of knock-out rates range from 20% to over 50%. For example, over 50% of L.A. police recruits are rejected on drug tests. And that's **before** they're on the job. That's one reason I don't speed in Los Angeles. With these high knock-out rates, we should be analyzing the efficiency and cost effectiveness of our total selection systems, and revising them accordingly.

Another active area involving both privacy and testing is polygraph testing. Over two million polygraph tests are administered per year, most of them for employment screening. Over the last several years, approximately one-half of the states have passed laws restricting or/and prohibiting polygraph testing.

The issues escalated. The National Polygraph Protection Act was just signed this June and will take effect this December. The Act was supported by APA, as reported in the August *Monitor.*

The Act prohibits the great majority of private employers from using polygraphs, voice stress analyzers and similar devices, to screen applicants. Employees can be polygraphed only when they are under reasonable individual suspicion, and are being investigated regarding some specific economic loss or injury.

We have had numerous symposia and journal articles on polygraphs. Key I-O issues have been polygraph validity, false positives, invasion of privacy, and its stressful, intrusive, mistrustful nature.

I was surprised how long standing our interest has been. I read in the current issue of *TIP* that Hugo Munsterberg developed a polygraph in 1907! Along with the usual physiological measures, he apparently used a word association test, measuring examinee pauses after certain types of words. Another component was an "automatograph." Examinees put their arms in a suspended sling, and used a pencil to trace patterns on paper. Liars, of course, traced a unique pattern. Polygraphs have progressed a long way since 1907. Or have they?

Much negative reaction to polygraph testing has spilled over into non-cognitive testing. Polygraph bills sometimes have been worded so broadly that they include not only voice stress analyzers and similar devices, but pencil-and-paper honesty tests, personality tests, and even attitude surveys.

For example, in Massachusetts a bill prohibiting polygraph testing includes pencil-and-paper honesty testing. In California a bill originally prohibited any employment test questions regarding personal lifestyle, or engagement in any activities that are legal. Please don't ask me what that means. What was lobbied into that bill by the state association was a requirement that the test be job related according to the test *Standards*.

This year a Connecticut bill died in committee that would have prohibited "psychological examinations" in employment. That could or could not have meant all

employment tests. This all-inclusiveness of proposed legislation may or may not be intentional.

Another area we need to watch is computerized personality test results and interpretation. Issues include validity of the results and interpretation, the accessibility of any validity information, and the confidentiality of the printed reports. Most of you are aware that APA's Joint Committee on Testing Practice and its Subcommittees are looking at this cluster of issues, among others. APA has already printed a *Guide for Computerized Tests and Interpretations*. Perhaps we can resolve these issues before legislation does it for us.

In general, we have seen a legal reaffirmation of individual rights, including employee rights. Employees now believe that they have a right to keep their jobs instead of working under an employment-at-will policy. This usually shows up in age discrimination or constructive discharge court cases. The cases frequently involve performance appraisal content and veracity. The leniency bias rater error that we complain of winds up costing employers money. Maybe now they'll listen.

People now expect to participate in decisions affecting them. They feel they have a right to know relevant information affecting their interests. We had a rash of truth-in-testing legislation a few years ago, in which several testing practices were challenged on these grounds. This year, in New York, a consumer advocacy group, and a group called FairTest, proposed legislation that would give examinees the option to take, or not take, experimental pre-test questions in tests such as the Scholastic Aptitude Test. Opponents of the bill include APA, the NYSPA, ETS, American College Testing, and others. It looks like another fight in progress.

Employees also believe that they have a right to know of any safety or health hazards in the workplace, and to be protected from them. That includes things like video display terminals, which may foster tunnel vision, night blindness and back problems. I might remind you here of Dan Ilgin's Presidential Address on Saturday titled "Health Issues at Work." Dan felt that I-O psychologists tend to ignore health issues when we should become more involved.

Health also includes protection from contagious diseases. That includes AIDS. The U.S. Supreme Court has ruled that a person with an infectious disease such as AIDS may be considered handicapped under the Rehabilitation Act of 1973, if there is no danger of infection. Also, employees who contact AIDS from a co-worker can sue for Workers' Compensation.

We should be concerned with AIDS not only from the perspectives of employee handicap, testing, and job relatedness. We also should consider employee performance standards and employee tenure. Also, employee fear and refusal to work alongside of AIDS cases. Also, homophobia among employees. And, since AIDS cases are 90% male, their equal employment opportunity is protected under the Civil Rights Act because of adverse impact.

There are numerous AIDS related symposia at this conference. APA has a task force on AIDS. I wonder how many I-0 psychologists even know the stages of AIDS. In 22 states AIDS testing is now illegal. There now are federal bills pending that would prohibit AIDS testing for employment. Again, we can expect further legislative action.

A minute ago I mentioned AIDS cases being considered handicapped. "Handicapped" of course, includes physically and mentally handicapped, including

retardation. It also includes those perceived to be handicapped, and those with a past record of handicap.

We're not sure if it includes those with the probability of being handicapped in the future. That means that it is still questionable to refuse to hire an applicant who, for example, may be expected to have a heart attack on a stressful job, or to develop some other predictable health condition. That kind of predictive screening is still open to question.

Emotional disorders may be handicaps. Twenty-six states allow mental stress Workers' Compensation claims. Claims for work related stress now account for 14% of all Workers' Compensation claims. California went from 1,000 stress claims in 1980 to 4,000 in 1984 alone. Huge sums of money are being awarded in these claims.

The National Institute for Occupational Safety and Health determined the jobs which are most stressful. Among the most stressful jobs were laborer, secretary, waiter and waitress, foreman, administrator, and manager. Common characteristics of these jobs include not being allowed to participate in work-related decisions, and being placed between conflicting groups. Aren't we glad we don't have jobs like that.

These Worker's Compensation claims may ignore whether an employee was exposed to more or less stress than co-workers. An employee may be more vulnerable to stress, or may carry more stress from non-work sources. What do we recommend in such cases in the way of selection, supervision, appraisal, motivation, and rewards?

We've learned to cope with these equal employment and handicapped definitions and distinctions in our validation studies, adverse impact analyses, affirmative action programs and so forth. But the number of included groups continues to grow.

The New Jersey State Supreme Court recently considered alcoholics to be handicapped, as chemically dependent. This seems in contrast to the U.S. Supreme Court also recently saying that the Veteran's Administration can consider alcoholism "willful misconduct" for purposes of its benefits.

A Federal judge in Philadelphia also found compulsive gambling to be a handicap covered by the Rehabilitation Act. As you know, the Act also requires Affirmative Action. I have not yet heard of Affirmative Action programs implemented for alcoholics or gamblers, but maybe we'll soon see Outreach programs in Vegas and Atlantic City.

These examples don't exhaust legislative developments. You can add others to the checklist. There's workforce illiteracy, which certainly applies to pencil-and-paper testing; comparable worth and equal pay, which may involve job analyses; aging in the workplace, which includes work performance; genetic screening, a predictive type of screening, which had appeared in I-O literature; smoking, which involves behavioral change at work; and sexual harassment, which gets into equal employment and stress.

And workplace surveillance, via telephone and electronic equipment. It's surprising what can be electronically monitored these days, including managerial appointments and agendas, and employee lunch and coffee breaks. "Big Brother" can even determine the time you spend in the restroom. We've come a long way from our early therbligs, Frederick Taylor, and industrial engineering. There are now bills pending in

states such as California and Massachusetts that would require notifying employees of any monitoring being done, the data being collected and how it will be used, and requiring a beeper or signal light to alert employees to the monitoring.

The SIOP State Affairs Committee is attempting to monitor these kinds of developments, as well as the previous subjects discussed by our speakers. The Subcommittee that I chair is in the process of establishing a network of I-O contacts in the individual states who watch these developments and try to deal with them. In this way, we can develop early warning signals, and deal more effectively with problems as they arise. For example, states with common problems can gain much by simply exchanging information among themselves.

At a macro level, we can oversee national trends. One pattern shows state legislation leading to national legislation, such as we've seen with polygraph legislation. We can expect to see the same with drug testing and rights to privacy. Our Committee expects to provide better input on these developments to our SIOP Executive Board.

Our Subcommittee has established contacts in 27 states so far. These states include 90% of SIOP membership. We did a frequency distribution of SIOP membership by state. It was quite interesting. Twenty-two percent of SIOP members are in only two states. Eight states contain over half. The distribution is in the pass-out materials. Also included is the current list of contacts established in the individual states. You may want to get a handout and keep in touch with your state contact regarding ongoing developments.

One reason we haven't yet established contacts in all states is because we've been short-handed as a Committee. I suppose we qualify as physically handicapped. I

would encourage those of you interested in these kinds of developments to volunteer for our Committee. It's interesting and exciting being on the cutting edge of things, and constructive. See any of us after this program if you're interested.

Thank you.